Editor's note: Appealed -- aff'd, sub nom. Rowell v. Andrus, Civ. No. C 77-106 (D. Utah April 3, 1978); aff'd in part, vacated in part and remanded, No. 78-1466 (10th Cir. Oct. 6, 1980), 631 F.2d 699

D. R. GAITHER ET AL.

IBLA 77-208, 212, 230, 249, 285, 286, 302, 453, 473

Decided September 12, 1977

Appeals from decisions of the Utah State Office, Bureau of the Land Management, requiring additional or increased rental prior to the issuance of noncompetitive oil and gas leases.

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Noncompetitive Leases--Oil and Gas Leases: Rentals--Regulations: Applicability

   Where the Department, through a duly promulgated regulation, has increased the rental rate on all noncompetitive oil and gas leases issued after a specified date, such increased rate is applicable to all leases issued subsequent to that date pursuant to over-the-counter offers or pursuant to the simultaneous filing procedures, even though the offers or entry cards were filed with BLM prior to the specified date.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Noncompetitive Leases

   An oil and gas lease offer under the Mineral Leasing Act, as amended, 30 U.S.C. § 181 et seq. (1970), does not create a property right in the offeror but is merely a hope or expectation. It is not a "vested right," a present legal or equitable "title," "interest" or "ownership" or "perfected right," to come within the protection of the Fifth or Fourteenth Amendment.

3. Administrative Procedure: Administrative Review--Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Rentals

Bureau of Land Management Instruction Memorandum No. 77-37 outlined a general policy for the assessment of additional rental on oil and gas lease offers pending when the rental rate was increased by regulation, but left to the discretion of the State Offices the particular implementing procedures. Procedures used by a State Office which may be different from other State Offices, but which do not prejudice the offerors' right to receive oil and gas leases if leases are issued on the lands applied for, are not arbitrary and capricious as to require reversal of the decisions assessing additional rental.

4. Administrative Procedure: Rulemaking--Regulations: Generally

The promulgation or revocation of a regulation is within the special authority of the Secretary of the Interior and a limited number of delegates. A regulation when promulgated is binding upon departmental officials.

5. Administrative Procedure: Rulemaking--Regulations: Generally

The requirement in the Administrative Procedure Act, 5 U.S.C. § 553(d) (1970), that the required publication of a substantive rule be made not less than 30 days before its effective date is satisfied by publication of proposed rulemaking with a 30-day comment period, followed thereafter by final rulemaking. Minor changes in a final rule from the proposed rule do not require new proposed rulemaking.

6. Administrative Procedure: Rulemaking--Oil and Gas Leases: Rental--Regulations: Generally

Assuming, arguendo, the applicability of the rulemaking provisions of the Administrative

Procedure Act, 5 U.S.C. § 553 (1970), to an amendment of 43 CFR 3102.3-2 increasing the rental rate of noncompetitive oil and gas leases, the provisions of the Act were satisfied where the proposed increase was published as proposed rulemaking on March 18, 1976, to be effective July 1, 1976, and final rulemaking was published January 5, 1977, changing the effective date of the rental increase to February 1, 1977.

APPEARANCES: Bruce C. Cohne, Esq., Cohne, Rappaport and Segal, Salt Lake City, Utah, for appellants; Lee Jorgensen, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

D. R. Gaither, Dean W. Rowell and Vaughn H. Duffin appeal from decisions by the Utah State Office, Bureau of Land Management (BLM), requiring payment of additional rentals on over-the-counter oil and gas lease offers. Lee Jorgensen appeals from a Utah State Office decision requiring the payment of advance rental at $1 per acre on a simultaneous oil and gas lease offer. These appeals have been consolidated for decision. 1/

Rental for noncompetitive oil and gas leases was increased to $1 per acre from $.50 per acre effective February 1, 1977, by amendment to 43 CFR 3103.3-2. 42 FR 1032 (January 5, 1977). The over-the-counter offers were all filed prior to February 1 and included advance rental for the first lease year at the old rate as required by 43 CFR 3103.3-1 (1976). Appellant Jorgensen received third priority in the September 1976 simultaneous drawing by the Utah State Office. When the offerors with first and second priority failed to respond to notices for payment of advance first-year rental, Jorgensen was notified by letter of February 16, 1977, to submit advance rental at the new rate.

Appellants make several arguments urging that they should not be subject to the rental increase. They argue first that the BLM Utah State Office did not comply with the procedures set out in BLM Instruction Memorandum No. 77-37 for assessing the rental increase to pending oil and gas lease offers. Second, they argue that the promulgation of the amendment to 43 CFR 3103.3-2 violated section 4(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 553(d) (1970). Finally, they argue that the different procedures used by various BLM State Offices constitute a violation

1/ The lease offers are listed in the Appendix.

of due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution and are a basis for a discrimination action under the Civil Rights Act of April 20, 1871, 42 U.S.C. § 1983 (1970).

We find appellants' arguments without merit and hold that the BLM Utah State Office properly assessed the additional rental.

[1] This Board has held several times, and appellants do not dispute, that where the Department, through a duly promulgated regulation, has increased the rental rate on all noncompetitive oil and gas leases issued after a specified date, such increased rate is applicable to all leases issued subsequent to that date pursuant to over-the-counter offers or pursuant to the simultaneous filing procedures, even though the offers or entry cards were filed with BLM prior to the specified date. E.g., Wanda C. Scheidt, 30 IBLA 346 (1977); Milton J. Lebsack, 29 IBLA 316 (1977); Raymond N. Joeckel, 29 IBLA 170 (1977).

[2] The decisions upholding the rental increase are based on the principle that an offer for an oil and gas lease under the Mineral Leasing Act, as amended, 30 U.S.C. § 181 et seq. (1970), does not create any property rights in the offeror but is merely a hope or expectation. E.g., McTiernan v. Franklin, 508 F.2d 885, 888 (10th Cir. 1975); Schraier v. Hickel, 419 F.2d 663, 666-67 (D.C. Cir. 1969); Miller v. Udall, 317 F.2d 573 (D.C. Cir. 1963); see Hannifin v. Morton, 444 F.2d 200 (10th Cir. 1971). Under section 17(c) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(c) (1970), the first qualified offeror is entitled to receive the oil and gas lease if a lease is issued for the lands applied for. This limited preference right is the only interest attached to an oil and gas lease offer. Southwestern Petroleum Corp. v. Udall, 361 F.2d 650, 654 (10th Cir. 1966).

In finding that a bona fide purchaser of an erroneously issued oil and gas lease has a superior right to the lease over the first qualified offeror for the land, the court in Southwestern Petroleum Corp. v. Udall, supra at 655, stated regarding an offer for a federal oil and gas lease:

> It was not then a "vested right," not a present legal or equitable "title," "interest" or "ownership" or "perfected right" at such time to come within the protection of the Fifth Amendment. It was a right to a right originating in the Mineral Leasing Act, later to become enforceable against the Secretary by reason of the Act and the decisions above referred to. It had not matured at the time Lowe's [the bona fide purchaser] rights attached to such a point that it was vested as to be protected by the Fifth Amendment.

Appellants argue that the Utah State Office's procedure of requiring additional rental within 15 days for groups of lease offers regardless of their nearness to issuance and without notice of appeal rights violates their constitutional rights. Since the actions of the State Office created no detriment to appellants' right to receive oil and gas leases if leases are issued for the lands applied for, as compared to the loss of that right in Southwestern Petroleum Corp., supra, we find the above-quoted statement of the court in that case dispositive of appellants' argument that their constitutional rights have been violated. They had no right which had vested so as to be protected by the Fifth or Fourteenth Amendment. We also note that this Board has no jurisdiction over alleged violations of 42 U.S.C. § 1893 (1970).

[3] Appellants' specific objections to the procedure of the Utah State Office are three: (1) the notice of additional rental was not in the form of a decision in that it did not contain a notification of the right to an appeal to this Board; (2) the notice contains no indication that the leases are nearing completion; and (3) the notice required payment within 15 days whereas other BLM State Offices were allowing 30 days. Appellants argue that the Utah procedure violates BLM Instruction Memorandum No. 77-37, dated January 19, 1977.

The Memorandum states in relevant part:

> On a case-by-case basis and as each case nears completion you will notify the offeror by decision of the increase in rental rate and that appropriate additional rental is now required. Provide an appropriate period within which to respond to your decision and if the offeror does not submit the additional rental, reject the offer based upon 43 CFR 3103.3-1. Under no circumstance reject any pending offer now without ample opportunity to provide the additional rental, nor should you further process or issue any leases without first obtaining the additional rental.

Even if we agree with appellants that the notice of additional rental should have informed the offeror of appeal rights, appellants here timely filed their appeals, they have been considered, and appellants were not otherwise harmed by this omission. The 15-day requirement is the same time period required by 43 CFR 3112.4-1 for the payment of rental by the first drawee qualified to receive a lease in a simultaneous oil and gas lease drawing. We note that no appellant in this case requested an extension of time to submit the payment because of any difficulties in raising the funds during the period allowed. The fact other BLM State Offices gave 30 days for

filing the additional rental does not require us to set aside the decisions of the Utah Office. While uniformity throughout BLM may be desirable, the instructions by BLM in interpreting the new regulation allowed the field offices some discretion in their implementation. The instructions gave no time period. As one court has stated:

> Administrative agencies and officers have a primary task to administer broad policy mandates for the common good of our society, and they cannot be required to refine their rules to assure tailor-made equity for each of the complexities that may arise. If they issue and interpret regulations which are rational and supportable in their general application, they cannot necessarily be charged with unreasonableness because in particular applications the regulations and general interpretations may grind with a rough edge.

Gulf Oil Corp. v. Hickel, 435 F.2d 440, 447 (D.C. Cir. 1970).

With respect to appellants' contention that there should have been notice that the lease offers were nearing "completion" before the rental rate was increased, the Memorandum does not require any notice to offerors that their lease offers are nearing completion. In fact, it expressly informs the State Offices not to "further process or issue any leases without first obtaining the additional rental."

Under the instructions in Memorandum No. 77-37, each State Office exercised some discretion in their implementation. We cannot find that the actions of the Utah State Office were abritrary or capricious. Appellants have demonstrated no harm prejudicing their limited preference right to receive oil and gas leases for the lands applied for if leases are issued. We therefore find that the Utah State Office's interpretation of Instruction Memorandum No. 77-37, and its actions pursuant to that interpretation, do not warrant reversal in the circumstances of these cases.

[4] Appellants next generally contend that the regulation was not validly promulgated. Some of the appellants also request the Secretary to revoke the regulation and establish new proposed rulemaking. The promulgation of a regulation or its revocation is within the special authority of the Secretary of the Interior and a limited number of Departmental officers delegated that authority, not this Board. A regulation once promulgated is binding upon Departmental officials. McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955). The Bureau of Land Management and this Board must apply a regulation where it is required. Our duty is to determine, in given cases,

that a regulation is or is not applicable to the particular factual circumstances. Here, appellants, in effect, are contending that the regulation should not be applied to them, as well as attacking its validity. While a finding that the regulation is applicable to appellants' offers is determinative, we shall discuss appellants' arguments concerning the requirements of the Administrative Procedure Act to note our rejection of the arguments.

[5, 6] Appellants make much of the fact the original proposed rulemaking was published on March 18, 1976, 41 FR 11314, with the rental increase to be applicable to noncompetitive oil and gas leases issued on and after July 1, 1976, whereas the final rule was published in the Federal Register on January 5, 1977, with the increase to be applicable to leases issued on and after February 1, 1977. Appellants contend statements in the January 5, 1977, publication explaining the final rulemaking indicate the BLM State Offices should have been given more time to process pending offers before the change in the rental rate. They appear to contend the regulation is invalid because it did not give sufficient time for BLM to adjudicate their pending offers. We cannot agree. Further, they appear to contend that because the effective date of the increased rental was changed from July 1, 1976, to February 1, 1977, new proposed rulemaking is required allowing the public 30 days for comments before the new effective date. This, they argue, is mandated by the requirements of the Administrative Procedure Act at 5 U.S.C. § 553(d) (1970), requiring 30 days between the publication date of a regulation and its effective date.

Assuming, arguendo, the applicability of the requirements of the Administrative Procedure Act here (without conceding or deciding the issue), we find that the promulgation of this regulation met such requirements. The main provision of the Act upon which appellants rely, 5 U.S.C. § 553(d), provides as follows:

> The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--
>
> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule.

The publication requirement, set out at 5 U.S.C. § 533(b) (1970), provides: "General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."

The purpose of the proposed rulemaking and publication provision has been stated by a court as follows: "Section 553 was enacted to give the public an opportunity to participate in the rulemaking process. It also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." (Citation omitted.) Texaco, Inc. v. Federal Power Commission, 412 F.2d 740, 744 (3d Cir. 1969).

If appellants are contending that the 30-day requirement was not satisfied because the final rulemaking was published on January 5, 1977, and the effective date was February 1, 1977, they are misreading the Act and misunderstanding its purpose. It is apparent that the 30-day requirement is satisfied where there has been publication of the proposed rule for the 30-day period and sometime after that time the final rules are published. See Lewis-Motta v. Secretary of Labor, 469 F.2d 478, 481 (2d Cir. 1972); Texaco, Inc. v. FPC, supra; Hotch v. United States, 212 F.2d 280, 284 (9th Cir. 1954).

Appellants seem to be arguing that a new comment period is triggered because the effective date for the rental increase was February 1, 1977, rather than July 1, 1976, and prior notice of this change was not made. We cannot agree that new proposed rulemaking was necessary to make such a change. It is very clear from court decisions that there may be changes in the rules as originally proposed and as published in final. As stated by the United States Court of Appeals for the Sixth Circuit in Chrysler Corp. v. Department of Transportation, 515 F.2d 1053, 1061 (1975):

> It is clear that an administrative rule as adopted need not be identical to the proposed version of the rule. See South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 656-59 (1st Cir. 1974); Buckeye Cablevision, Inc. v. FCC, 128 U.S.App.D.C. 262, 387 F.2d 220, 226 & n. 26 (1967); California Citizens Band Ass'n v. United States, 375 F.2d 43, 47-49 (9th Cir.), cert. denied, 389 U.S. 844, 88 S.Ct. 96, 19 L.Ed.2d 112 (1967). Indeed, the APA requires only that the notice of proposed rule making contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). When courts in the past have overturned an administrative regulation on the ground of

> inadequate notice, usually either the agency gave no notice at all or there were major substantive differences between the proposed rule and the rule as adopted. Compare Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969), with Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972).

In another direct response to the argument that new proposed rulemaking must follow if there are changes in the final rulemaking, it was stated:

> Parties have no right to insist that a rule remain frozen in its vestigal form. See Pacific Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir. 1965). As the Court of Appeals for the District of Columbia Circuit recently said:
>
> > The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions. 51/
> >
> > 51/ A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.
>
> International Harvester Co. v. Ruckelshaus, 155 U.S. App. D.C. 411, 478 F.2d 615, 632 n. 51 (1973). See also Owensboro on the Air, Inc. v. United States, 104 U.S. App. D.C. 391, 262 F.2d 702, 708 (1958).

South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 659 (1st Cir. 1974).

The fact that minor changes may have been made in the final from the proposed rulemaking, therefore, does not invalidate the final rulemaking. The change to which appellants point, the change of the date from July 1, 1976, to February 1, 1977, as the effective date for which the rental rate would be applicable, was not a major or substantive change in the proposed regulation and certainly did not warrant a new proposed rulemaking comment period before the final rulemaking could become effective. As

appellants' offers were pending when the change became effective, they were subject to the increased rental rate, and notice by the BLM State Office to that effect was proper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

_____
Joan B. Thompson
Administrative Judge

We concur:

_____
Newton Frishberg
Chief Administrative Judge

_____
Douglas E. Henriques
Administrative Judge

APPENDIX

IBLA Docket No.	Offeror	Offer No.
77-208	D. R. Gaither	U-35661 to 69 U-35812 to 15 U-35819 U-36260
77-212	Lee Jorgensen	U-34678
77-230*	Dean W. Rowell	U-34109 U-34945 U-34956 to 57 U-35254 U-35353 to 58 U-35365 to 69 U-35371 to 73 U-35458 U-35463 U-35474 U-35476 U-35478 U-35575 to 96 U-35634 to 36 U-35638 to 46 U-35648 U-35650 to 54 U-35656 U-35734 U-35800 to 03 U-35805 to 08 U-35810 to 11
77-249	Vaughn H. Duffin	U-36671
77-285	D. R. Gaither	U-36318 U-36666 to 67
77-286	Vaughn H. Duffin	U-36670 U-36672 to 73

*/ IBLA 77-230A contained lease offers U-35735 to 38 by Dean W. Rowell which were originally part of IBLA 77-230. After Rowell withdrew the offers, the appeals relating to them were dismissed by Order dated June 17, 1977. Also, oil and gas lease offers U-35632 and U-35633 were listed in the BLM decision but were not included in appellant Rowell's Notice of Appeal.

77-302	Dean W. Rowell	U-35352 U-35359 to 64 U-35462 U-36669
77-453	Dean W. Rowell	U-35091 U-35143 U-35257
77-473	Dean W. Rowell	U-34953 to 55 U-35259 U-35467